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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16

17 DANIEL MATERA and SUSAN  
18 RASHKIS, as individuals, and on behalf of  
other persons similarly situated,

19 Plaintiffs,

20 v.

21 GOOGLE, INC.,

22 Defendant.  
23  
24  
25  
26  
27  
28

Case No. 5:15-cv-04062 LHK

**PLAINTIFFS' NOTICE OF MOTION;  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT; AND MEMORANDUM  
OF POINTS AND AUTHORITIES**

Date: August 31, 2017

Time: 1:30 p.m.

Courtroom: 8, 4th Floor

Judge: The Hon. Lucy H. Koh

1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 **PLEASE TAKE NOTICE** that on August 31, 2017, at 1:30 p.m., in the Courtroom of the  
4 Honorable Lucy H. Koh, United States District Judge for the Northern District of California, 280  
5 South 1<sup>st</sup> Street, 4th Floor, Courtroom 8, San Jose, California 95113, Plaintiffs Daniel Matera and  
6 Susan Rashkis (“Plaintiffs”), will and hereby do move the Court, pursuant to Federal Rule of  
7 Civil Procedure 23, for an Order:

- 8 a) Granting preliminary approval of the proposed Class Action Settlement Agreement  
9 (“Settlement”) entered into between the parties;<sup>1</sup>  
10 b) Certifying the Settlement Class as defined in the Settlement;  
11 c) Appointing Plaintiffs Daniel Matera and Susan Rashkis as Class Representatives  
12 of the proposed Classes;  
13 d) Appointing Michael W. Sobol of Lieff Cabraser Heimann & Bernstein LLP, Hank  
14 Bates of Carney Bates & Pulliam PLLC, and Ray Gallo of Gallo LLP as Class  
15 Counsel for the proposed Classes;  
16 e) Approving the parties’ proposed notice program, including the proposed form of  
17 notice set forth in the Settlement, and directing that notice be disseminated  
18 pursuant to such program;  
19 f) Appointing KCC Class Action Services, LLC (“KCC”) as Settlement  
20 Administrator, and directing KCC to carry out the duties and responsibilities of the  
21 Settlement Administrator specified in the Settlement;  
22 g) Staying all non-Settlement related proceedings in the above-captioned case (the  
23 “Action”) pending final approval of the Settlement; and  
24 h) Setting a Fairness Hearing and certain other dates in connection with the final  
25 approval of the Settlement.

26 This motion is based on this notice of motion and motion, the accompanying  
27 memorandum of points and authorities, the Settlement, including all exhibits thereto, the  
28 accompanying Joint Declaration of Hank Bates, Michael W. Sobol, and Ray Gallo (“Joint  
Decl.”), the argument of counsel, all papers and records on file in this matter, and such other  
matters as the Court may consider.

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<sup>1</sup> See Exhibit 1 to the Joint Declaration of Michael W. Sobol, Hank Bates, and Ray Gallo (“Joint Declaration”).

1 Dated: July 21, 2017

Respectfully submitted,

2 By: /s/ Michael W. Sobol

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs and Defendant Google Inc. (“Google”) have reached a settlement (the  
4 “Settlement”) to resolve the above-captioned action (the “Action”). Following the Court’s order  
5 on March 15, 2017 denying the parties’ first motion for preliminary settlement approval (ECF  
6 No. 71, the “Order”), the parties returned to litigation and discovery and concurrently negotiated  
7 the revised Settlement attached as Exhibit 1 to the Joint Declaration of Hank Bates, Michael  
8 Sobol, and Ray Gallo (“Joint Decl.”).

9 The Settlement advances the privacy of Class Members’ electronic communications and  
10 addresses the specific concerns identified in the Order and the Court’s prior comments and  
11 rulings in the case. It would enjoin Google from any and all processing of email content for  
12 “Advertising Purposes” prior to the point when the Gmail user can retrieve the email in his or her  
13 Gmail mailbox (“pre-delivery processing”). “Advertising Purposes” means for the purpose of  
14 serving advertisements, including advertisements served in Gmail and in other Google products  
15 and services. “Advertising Purposes” includes the creation of user models for the purpose of  
16 serving advertising. Further, the Settlement enjoins Google from using information it obtains  
17 from automated pre-delivery processing for Advertising Purposes, even if the information is also  
18 used for a non-Advertising Purpose. This means that the “dual purpose” processing that would  
19 have been allowed under the prior proposed settlement (that is, processing done for both  
20 Advertising Purposes and non-Advertising Purposes like spam detection) will no longer be  
21 permitted under the current proposed Settlement.

22 As the parties advised the Court in their June 28, 2017 Case Management Statement (ECF  
23 No. 76), Google also will stop processing the contents of emails after they are stored in Gmail  
24 user’s inboxes for Advertising Purposes, a business practice change that Google will implement  
25 independently of the Settlement, but which, consistent with its spirit and its terms, enhances the  
26 injunctive relief obtained here on behalf of the Settlement Class.

27 Google has agreed to bear the costs of administering the Settlement, including any  
28 attorneys’ fees and expenses and Service Awards to the Class Representatives that may be



1 awarded by the Court, and a robust and far-reaching Notice program to advise the Settlement  
2 Class of this litigation and the Settlement. The proposed Internet and website media notice  
3 campaign will disclose to Settlement Class members the scope and limitations of Google's  
4 processing of the electronic communications they send to Gmail users, along with their legal  
5 rights and options, including their objection and exclusion rights. The parties have proposed that  
6 KCC Class Action Services, LLC ("KCC") serve as the Settlement Administrator.

7 In exchange for the injunctive relief achieved by the Settlement, Settlement Class  
8 members would release their claims for injunctive and non-monetary equitable relief only,  
9 specifically retaining any claims for monetary relief under CIPA and ECPA.

10 The Settlement resulted from extensive arm's-length negotiations between the parties, and  
11 specific guidance from the Court. Prior to the first motion for preliminary approval, settlement  
12 negotiations spanned over two months and included two mediation sessions before respected and  
13 skilled mediator, Randall Wulff. Since March of 2017, the parties continued to engage in arm's-  
14 length negotiations. In parallel, adversarial discovery has continued (and continues through the  
15 present) for purposes of prosecuting the Action.

16 Class Counsel advocated vigorously for Class Members. They have researched the law  
17 and the facts involved in this case, reviewed and analyzed over 233,000 pages of documents  
18 produced by Google, including by conducting a targeted and meaningful review of more than  
19 103,000 pages of documents produced since the Court's March 15 Order. They have prior  
20 litigation experience applying CIPA and ECPA in varied factual contexts, have analyzed  
21 deposition testimony from key Google employees from other litigation, and now have also taken  
22 the deposition of a key Google employee and a corporate designee to ensure that the proposed  
23 injunction addresses Google's current practices. Class Counsel had a firm understanding of both  
24 the strengths and weaknesses of Plaintiffs' claims, the technical details of Gmail's email delivery  
25 process and targeted advertising processes and Google's potential defenses when approaching  
26 settlement negotiations. Both sides were well-represented by experienced and informed counsel  
27 who represented their respective clients fully and zealously.

28 In sum, the Settlement requires Google to make significant business practice changes that

1 will benefit Class Members now and prospectively, without the inherent risks of continued  
2 litigation and without requiring Class Members to release any claims they may have for monetary  
3 relief. The Settlement was only reached after months of discovery and arm's-length negotiations  
4 and enjoys the support of a neutral mediator who had an integral part in the settlement  
5 negotiations. Accordingly, the Settlement falls within the "range of reasonableness" and satisfies  
6 the criteria for preliminary approval.

## 7 **II. OVERVIEW OF THE LITIGATION**

### 8 **A. Procedural History**

9 Plaintiff Daniel Matera, on behalf of himself and a putative class, filed this Action  
10 September 4, 2015. (ECF No. 1). The Complaint alleged that Google applies automated  
11 processing to intercept, extract, read, and use the email contents of individuals who do not have  
12 email accounts with Google ("non-Gmail" users)—but who exchange email messages with Gmail  
13 accountholders—for use in advertising in violation of the California Invasion of Privacy Act, Cal.  
14 Pen. Code §§ 630, *et seq.* ("CIPA") and the Electronic Communications Privacy Act, 18 U.S.C.  
15 §§ 2510, *et seq.* ("ECPA").

16 On October 29, 2015, Google concurrently filed a Motion to Dismiss the Complaint (ECF  
17 No. 20) and a Motion to Stay (ECF No. 21) in light of the Supreme Court's then-pending opinion  
18 in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016) ("*Spokeo*"). In response, on December 4, 2015,  
19 Plaintiffs filed an Opposition to Google's Motion to Dismiss (ECF No. 29) and an Opposition to  
20 Google's Motion to Stay (ECF No. 30). The Court granted Google's Motion to Stay. (ECF  
21 No. 36). Following the issuance of the *Spokeo* opinion on May 16, 2016, the parties provided  
22 additional, supplemental briefing on the opinion's impact, if any, on Plaintiff Matera's Article III  
23 standing (ECF Nos. 41-42, 45-46).

24 On August 12, 2016, the Court issued an Order Denying Google's Motion to Dismiss as  
25 to the Merits of Plaintiff's Claims (ECF No. 49). Separately, on September 23, 2016, the Court  
26 issued an Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Based on  
27 Lack of Standing (ECF No. 54), which granted, with prejudice, Google's motion to dismiss  
28

1 Plaintiff Matera's claim for an injunction as it relates to Google Apps for Education,<sup>2</sup> but which  
2 denied the remainder of Google's motion.

3 Subsequently, on October 17, 2016, Plaintiff Matera filed an Amended Complaint (ECF  
4 No. 58), adding additional Named Plaintiff Susan Rashkis, eliminating allegations pertaining to  
5 Google Apps, and refining and clarifying allegations relating to technical aspects of Google's  
6 challenged practices. On October 21, 2016, Google filed its Answer to the Amended Complaint  
7 (ECF No. 59).

8 **B. Discovery**

9 Plaintiffs propounded initial sets of Interrogatories and Requests for Production on June  
10 13, 2016, and Google propounded commensurate discovery on July 27, 2016. Throughout the  
11 summer of 2016, Google produced over 130,000 pages of documents, which Plaintiffs carefully  
12 reviewed and analyzed. These productions included relevant deposition testimony, interrogatory  
13 answers, and documents produced in the prior multi-district litigation challenging the same  
14 practices as the instant litigation, *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK (N.D.  
15 Cal.) ("*In re Gmail*"), as well as documents produced in response to targeted discovery regarding  
16 Google's email processing practices, the various servers and devices used to process emails,  
17 points of time during the email delivery process that Google processes emails, and the purposes  
18 for which Google processes emails. Following the hearing on March 9, 2017, Google  
19 supplemented its responses to Plaintiffs' Requests for Production, and to date has produced over  
20 103,000 new pages of documents as part of a rolling production anticipated to be substantially  
21 completed by the end of August 2017. Additionally, Plaintiffs served Requests for Admission and  
22 a Second Set of Interrogatories on May 17, 2017, to which Google responded on June 20, 2017.

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23  
24 <sup>2</sup> Plaintiffs initially challenged automated scanning practices associated with each of Google's  
25 email platforms: Gmail, Google Apps for Education, and Google Apps for Business. *See*,  
26 Complaint (ECF No. 1). The Court determined that "Google ceased intercepting and scanning, for  
27 advertising purposes, the contents of emails processed via Google Apps for Education" (ECF No.  
28 54 at 27). In addition, although the Court denied Google's motion as it relates to Google Apps  
for Work, the Court noted that "the Court has learned that Google publicly represents that Google  
no longer intercepts, scan and analyzes for advertising purposes emails transmitted via Google  
Apps for Work" (*id.* at 32). Consequently, as noted above, the Amended Complaint eliminated  
allegations related to Google Apps for Education and Google Apps for Work.

1           **C.     Settlement**

2           The parties participated in mediations before the highly respected mediator, Randall Wulff  
3           on August 31, 2016 and November 4, 2016. Those mediations resulted in a proposed settlement,  
4           executed on November 22, 2016, which was not granted preliminary approval. ECF No. 71.  
5           Subsequently, with the benefit of guidance from the Court, the parties resumed discovery,  
6           engaged in further negotiations regarding the remaining terms of the Settlement, and developed a  
7           comprehensive revised set of settlement papers, including the Settlement Agreement (Joint Decl.  
8           Ex. 1), the proposed Notice, and the proposed orders submitted herewith. The revised Settlement  
9           was executed by all parties on July 21, 2017.

10          **III.    THE PROPOSED SETTLEMENT AND SCHEDULE OF EVENTS**

11           **A.     Summary of the Settlement Terms**

12           The Settlement requires Google to make significant technical changes to its processing of  
13           email messages that will benefit both a Class of California residents (“CIPA Class”) and a  
14           nationwide Class (“ECPA Class”), defined as follows:

15           CIPA Class:

16           All natural persons in the State of California who have never established a Gmail  
17           account with Google, and who have sent unencrypted emails to individuals with  
18           Gmail accounts.

18           ECPA Class:

19           All natural persons in the United States who have never established a Gmail  
20           account with Google, and who have sent unencrypted emails to individuals with  
21           Gmail accounts.

22           All members of both the CIPA Class and ECPA Class were subject to Google’s practice  
23           of processing information obtained from electronic communications in transmission to or from  
24           Google for Advertising Purposes. Pursuant to the terms of the Settlement, Google has agreed to  
25           the entry of a stipulated injunction—to be effective for not less than three years commencing one-  
26           hundred eighty (180) days after the Court enters final judgment<sup>3</sup>—addressing such processing, as

27           <sup>3</sup> In the Settlement Agreement, Google affirmatively represents “that it has no present intention of  
28           eliminating the technical changes [required by the Settlement] after the expiration of the term of  
29           the injunction. Google believes, however, that the architecture and technical requirements for  
30           providing email services on a large scale evolve and change dynamically and that a longer  
31           commitment may hinder Google’s ability to improve and change its architecture and technology  
32           to meet changing demands.” Settlement Agreement, ¶ 40(d).

1 follows:

2 **i. Incoming Email Sent to a Gmail User**

3 Google will cease all processing of email content that it applies prior to the point when the  
4 Gmail user can retrieve the email in his or her mailbox using the Gmail interface (“pre-delivery  
5 processing”) and that is used for Advertising Purposes. No information resulting from pre-  
6 delivery processing of email content<sup>4</sup> will be used for any Advertising Purpose. In addition,  
7 information from pre-delivery processing of email content that occurred before the date of this  
8 Agreement or that occurs before the stipulated injunction goes into effect will not be used for  
9 Advertising Purposes once the stipulated injunction commences. Settlement Agreement, ¶ 40(a).

10 **ii. Outgoing Email Sent to a non-Gmail User**

11 Although Google does not currently process outgoing emails for Advertising Purposes,  
12 Google will continue to refrain from processing of email content prior to the point when the  
13 Gmail user can retrieve the outgoing email in his or her mailbox using the Gmail interface  
14 (“outbound processing”) that is used for Advertising Purposes and from using information from  
15 outbound processing of email content for any Advertising Purposes. Settlement Agreement, ¶  
16 40(b).

17 **iii. Technical Implementation**

18 Google will implement architectural changes necessary to effectuate the Settlement terms  
19 by either eliminating altogether certain scanning processes during email delivery or ensuring that  
20 the outputs created from those processes are not used for any Advertising Purposes. Google  
21 currently anticipates that it will apply the former approach of eliminating scanning processes that  
22 are currently applied in the delivery process and used solely for Advertising Purposes. Upon  
23 execution of the required changes, Google will deliver a written certification under oath to Class  
24 Counsel stating that it has made the technical changes required to comply with the stipulated  
25 injunction. Settlement Agreement, ¶ 40(f). Moreover, Google will provide Plaintiffs discovery

26 <sup>4</sup> The settlement focuses on the practices challenged in Plaintiffs’ Amended Complaint. The  
27 settlement prohibitions will not prevent Google from processing incoming and outgoing email for  
28 purposes other than Advertising Purposes (such as the prevention of spam or malware), but it will  
prevent Google from using for Advertising Purposes any information resulting from such  
processing, at any time.

sufficient to enable Plaintiffs to verify the required technical changes. Settlement Agreement, ¶ 40(e).

The Settlement further provides that Settlement Administrative costs and any award of attorneys' fees and costs and/or service awards to the Class Representatives will be paid by Google. Google has agreed to pay (1) a reasonable attorneys' fee award as approved by the Court, in an amount not to exceed \$2,200,000 in fees and up to \$100,000 for Class Counsel's actual out-of-pocket expenses, and (2) service awards in the amount of \$2,000 to each of the Class Representatives. Settlement Agreement, ¶¶ 64-67.

In exchange for the foregoing consideration, the Action will be dismissed with prejudice upon final approval of the Settlement, and the Class Members will thereby release all claims which have been or could have been asserted against the Google Releasees, as that term is defined in the Settlement Agreement, by any member of the Classes in this Action, with the caveat that the release provided under the Settlement Agreement extends solely to claims for declaratory, injunctive, and non-monetary equitable relief. No Class Member, with the exception of the Named Representatives, will release any claim for monetary damages. The specific terms of the release are set forth in the Settlement Agreement at ¶ 41.

**B. Proposed Schedule of Events**

Consistent with the provisions of the Settlement, Plaintiffs respectfully propose the following schedule for the various Settlement events:

Date	Event
Notice of Settlement to be Disseminated	21 days after the entry of the Court's Order of Conditional Class Certification and Preliminary Approval of Settlement
Class Counsel's motions for final approval and for attorneys' fees, costs, and service awards	60 days after the entry of the Court's Order of Conditional Class Certification and Preliminary Approval of Settlement
Objection Deadline	90 days after Dissemination of Notice
Deadline for Parties to File a Written Response to Any Comment or Objection Filed by a Class Member	100 days after Dissemination of Notice
Settlement Administrator affidavit of compliance with notice requirements	14 days before Final Approval Hearing
Final Approval Hearing	August 31, 2017 at 1:30 p.m., or as soon thereafter as is convenient for the Court

1 **IV. LEGAL ANALYSIS**

2 **A. Applicable Legal Standards**

3 Federal Rule of Civil Procedure 23 requires judicial approval of the compromise of claims  
4 brought on a class basis. The procedure for judicial approval of a proposed class action settlement  
5 is well established and is comprised of the following:

- 6 (1) Certification of a settlement class and preliminary approval of the proposed  
7 settlement after submission to the Court of a written motion for preliminary  
8 approval.  
9 (2) Dissemination of notice of the proposed settlement to the affected class  
10 members.<sup>5</sup>  
11 (3) A formal fairness hearing, or final settlement approval hearing, at which  
12 evidence and argument concerning the fairness, adequacy, and  
13 reasonableness of the settlement are presented.

14 *See* Manual for Complex Litigation (Fed. Jud. Center, 4th Ed. 2004), § 21.63 (“Manual”). This  
15 procedure safeguards class members’ procedural due process rights and enables the Court to  
16 fulfill its role as guardian of class interests. *See* Newberg on Class Actions, § 11.22 *et seq.* (4th  
17 ed. 2002) (“Newberg”).

18 At this juncture and with this motion, Plaintiffs respectfully request that the Court take the  
19 first steps in the settlement approval process by granting preliminary approval of the proposed  
20 Settlement, certifying the proposed Classes for settlement purposes, and directing that notice be  
21 disseminated to the Class Members pursuant to the proposed notice program.

22 **B. Certification of the Proposed Settlement Class is Appropriate**

23 Plaintiffs contend, and Google does not dispute, for settlement purposes only, that the  
24 proposed classes meet the requirements for class certification under Rule 23(a) and Rule 23(b)(2).

25 **1. Rule 23(a) is Satisfied.**

26 **a. The Settlement Classes are Too Numerous to Permit Joinder**

27 A case may be certified as a class action only if “the class is so numerous that joinder of  
28 all members is impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no fixed rule, numerosity is

<sup>5</sup> As discussed in greater detail in Section D, *infra*, mandatory notice is not required for classes  
certified under Rule 23(b)(2), however the parties have agreed to put into place an extensive  
Notice Plan, consisting of 100,000,000 unique online impressions aimed at reaching Class  
Members.

generally presumed when the potential number of class members reaches forty (40). *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). In addition, “[b]ecause plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on [ ] reasonable inference[s] arising from plaintiffs’ other evidence that the number of unknown and future members of [the] proposed [class . . . is sufficient to make joinder impracticable.” *Arnott v. U.S. Citizenship & Immigration Services*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) (all but last alteration in original) (quoting *Sueoka v. United States*, 101 F. App’x 649, 653 (9th Cir. 2004)).

Here, numerosity is easily inferred. In a recent earnings call, Google announced that it has over one billion monthly active Gmail users.<sup>6</sup> If even one percent of that user base exchanged an email with a unique person in the United States who used an email service other than Gmail, the ECPA Class would contain ten million members. Assuming that approximately 10 percent of such persons reside in California, the CIPA Class would contain one million members. Accordingly, the Settlement Classes are sufficiently numerous to satisfy Rule 23(a)(1).

**b. This Action Presents Common Questions of Law or Fact**

Rule 23(a)(2) requires that there be one or more questions common to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011); 4 Newberg § 3.10. Plaintiffs “need only show the existence of a common question of law or fact that is significant and capable of classwide resolution.” *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 592 (N.D. Cal. 2015) (citations omitted). Plaintiffs easily meet this standard, as several significant common questions of law and fact exist, including the following:

- (1) Whether Google’s acts and practices complained of herein amount to an intentional and unauthorized connection to an electronic communication, in violation of Cal. Pen. Code § 631(a) (on behalf of the CIPA Class);

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<sup>6</sup> Frederic Lardinois, “Google Now Has More Than 1B Monthly Active Users,” TechCrunch (Feb. 1, 2016) (available at <https://techcrunch.com/2016/02/01/gmail-now-has-more-than-1b-monthly-active-users/>).



- 1 (2) Whether Google's acts and practices complained of herein amount to the  
2 willful and unauthorized reading, attempting to read, or learning the  
3 contents or meaning of Plaintiffs' and Class Members' in-transit  
4 communications, in violation of Cal. Pen. Code § 631(a) (on behalf of the  
5 CIPA Class);
- 6 (3) Whether Google used or attempted to use any information acquired in  
7 violation of Cal. Pen. Code § 631(a) (on behalf of the CIPA Class);
- 8 (4) Whether Google intentionally intercepted, endeavored to intercept, or  
9 procured any other person to intercept or endeavor to intercept Plaintiffs'  
10 and Class Members' electronic communications in violation of 18 U.S.C. §  
11 2511(1)(a) (on behalf of the ECPA Class);
- 12 (5) Whether Google acquired any "contents" of Plaintiffs' and Class Members'  
13 electronic communications, within the meaning of 18 U.S.C. § 2510(8) (on  
14 behalf of the ECPA Class);
- 15 (6) Whether Plaintiffs' and Class Members' emails were "electronic  
16 communications" within the meaning of 18 U.S.C. § 2510(12) (on behalf  
17 of the ECPA Class);
- 18 (7) Whether Google used an "electronic, mechanical, or other device," within  
19 the meaning of 18 U.S.C. § 2510(5) (on behalf of the ECPA Class); and
- 20 (8) Whether Google intentionally used, or endeavored to use, the contents of  
21 Plaintiffs' and Class Members' electronic communications, knowing or  
22 having reason to know that the information was obtained in violation of 18  
23 U.S.C. § 2511(1)(a) (on behalf of the ECPA Class).

24 The above questions will generate classwide answers that are central to resolving the  
25 Action. For example, whether Google processed non-Gmail users' emails before a Gmail user  
26 could access that email, as opposed to when those emails have already been received by the  
27 recipient, goes towards a key element of Plaintiffs' claims. *See In re Yahoo Mail Litig.*, 308  
28 F.R.D. at 591. Commonality is therefore satisfied.

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1                                    **d.     Plaintiffs and Their Counsel Will Fairly and Adequately**  
2                                    **Protect the Interests of the Settlement Class Members**

3                                    Rule 23(a)(4) requires that the representative plaintiffs will “fairly and adequately” protect  
4                                    the interests of the class. The two-prong test for determining adequacy is: “(1) Do the  
5                                    representative plaintiffs and their counsel have any conflicts of interest with other class  
6                                    members?, and (2) will the representative plaintiffs and their counsel prosecute the action  
7                                    vigorously on behalf of the class?” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003);  
8                                    (citing *Hanlon*, 150 F.3d at 1020). Both prongs are satisfied here.

9                                    First, the named Plaintiffs’ interests are aligned with, and are not antagonistic to, the  
10                                    interests of the Settlement Class Members. Indeed, the named Plaintiffs and the Settlement Class  
11                                    Members, as non-Gmail accountholders, are equally interested in ensuring that Google’s  
12                                    treatment of and practices regarding the content of their private email communications are  
13                                    conducted in compliance with ECPA and CIPA. *See Hanlon*, 150 F.3d at 1021 (adequacy  
14                                    satisfied where “each . . . plaintiff has the same problem”). Accordingly, the named Plaintiffs will  
15                                    fairly and adequately protect the interests of all Settlement Class Members.

16                                    Second, Class Counsel have extensive experience litigating and settling class actions,  
17                                    including consumer cases throughout the United States. *See Joint Decl.*, ¶¶ 22-29. Class Counsel  
18                                    are well qualified to represent the Settlement Class. In addition, Class Counsel have vigorously  
19                                    litigated this action in order to protect the interests of the Settlement Class and had a wealth of  
20                                    information at their disposal before entering into settlement negotiations, which allowed Class  
21                                    Counsel to adequately assess the strengths and weaknesses of Plaintiffs’ case and balance the  
22                                    benefits of settlement against the risks of further litigation. *See Joint Decl.*, ¶¶ 11-13, 30-31. Thus,  
23                                    Class Counsel have and will continue to fairly and adequately protect the interests of all  
24                                    Settlement Class Members.

25                                    **2.     The Requirements of Rule 23(b)(2) are Satisfied**

26                                    In addition to the requirements of Rule 23(a), at least one of the prongs of Rule 23(b) must  
27                                    be satisfied. Here, the proposed Settlement Classes satisfy Rule 23(b)(2), which permits a class  
28                                    action if the Court finds that “the party opposing the class has acted or refused to act on grounds

1 that apply generally to the class, so that final injunctive relief or corresponding declaratory relief  
2 is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

3 Under identical circumstances, this Court has held that the requirements of Rule 23(b)(2)  
4 are satisfied where “all emails sent from and to [an electronic communication service provider’s]  
5 subscribers are subject to the same interception and scanning processes.” *In re Yahoo Mail Litig.*,  
6 308 F.R.D. at 598 (“*Yahoo*”). Like this Action, *Yahoo* dealt with an email service provider’s  
7 common policy and practice of processing emails exchanged between Yahoo’s email subscribers  
8 and members of the class of non-Yahoo email users before the Yahoo user could access that  
9 email in his or her mailbox. *Id.* Where, as here, the plaintiffs sought “uniform relief” addressing  
10 commonly- and consistently-applied message-scanning practices, the Court held that the  
11 requirements of Rule 23(b)(2) were satisfied. *Id.* at 600. *See also Campbell v. Facebook Inc.*, 315  
12 F.R.D. 250, 269-70 (N.D. Cal. 2016) (same) (citing *Yahoo*, 308 F.R.D. at 598-601). The same is  
13 true here, and Rule 23(b)(2) is accordingly satisfied.

14 **C. Preliminary Approval of the Settlement is Appropriate**

15 Public policy “strong[ly] . . . favors settlements, particularly where complex class action  
16 litigation is concerned.” *Pilkington v. Cardinal Health, Inc.*, 516 F.3d 1095, 1101 (9th Cir. 2008);  
17 *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City*  
18 *of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

19 “[T]he decision to approve or reject a settlement is committed to the sound discretion of  
20 the trial judge because he is exposed to the litigants and their strategies, positions, and proof.”  
21 *Hanlon*, 150 F.3d at 1026. In exercising such discretion, the Court should give “proper deference  
22 to the private consensual decision of the parties . . . [T]he court’s intrusion upon what is otherwise  
23 a private consensual agreement negotiated between the parties to a lawsuit must be limited to the  
24 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
25 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a  
26 whole, is fair, reasonable and adequate to all concerned.” *Hanlon*, 150 F.3d at 1027. *See also* Fed.  
27 R. Civ. P. 23(e)(2).

28 The proposed Settlement here satisfies the standard for preliminary approval because (a) it

1 is within the range of possible approval; (b) there is no reason to doubt its fairness because it is  
2 the product of hard-fought, arm's-length negotiations between the parties and was only reached  
3 after a thorough investigation by Plaintiffs' Counsel of the facts and the law; and (c) Plaintiffs  
4 and Class Counsel believe it is in the best interest of the Settlement Classes.

5 **1. The Settlement Falls Within the Range of Possible Approval**

6 To grant preliminary approval of the proposed Settlement, the Court need only find that it  
7 falls within "the range of reasonableness." 4 Newberg § 11.25. The Manual for Complex  
8 Litigation characterizes the preliminary approval stage as an "initial evaluation" of the fairness of  
9 the proposed settlement made by the court on the basis of written submissions and informal  
10 presentation from the settling parties. Manual § 21.632. Evaluating where a proposed settlement  
11 falls within this spectrum entails focus "on substantive fairness and adequacy," weighing  
12 "plaintiffs' expected recovery . . . against the value of the settlement offer." *Hendricks v. Starkist*  
13 *Co.*, No. 13-cv-00729-HSG, 2015 U.S. Dist. LEXIS 96390, at \*17-18 (N.D. Cal. July 23, 2015)  
14 (quotation omitted).

15 Here, Plaintiffs sought declaratory, injunctive, and non-monetary equitable relief under  
16 CIPA and ECPA. While Google has vigorously opposed such relief, the terms of the Settlement  
17 provide just that: Google has agreed to undertake substantial changes to its Gmail architecture,  
18 which Plaintiffs contend will bring Google's practices challenged in this litigation into  
19 compliance with Plaintiffs' view of both California and Federal wiretapping laws. Put simply,  
20 Google will cease the processing of email content that is done during the Gmail delivery process  
21 for Advertising Purposes. Thus, Plaintiffs have achieved their goal in litigating this Action.

22 In contrast to the tangible, immediate benefits of the Settlement, the outcome of continued  
23 litigation and a trial against Google is uncertain and could add years to this litigation. Google has  
24 vigorously denied Plaintiffs' allegations of wrongdoing, and, absent settlement, Plaintiffs  
25 anticipate Google would defend this action aggressively at multiple, procedural steps prior to  
26 trial, including a motion in opposition to class certification and a motion for summary judgment.  
27 While Plaintiffs strongly believe in the merits of their case, they recognize that the law is in  
28 relative infancy in the context of CIPA's and ECPA's application to email communications, and

1 this uncertainty presents at least some element of risk at multiple, critical junctures in this Action.  
2 For instance, while it is settled that the scanning email content *after* a message's delivery does not  
3 violate CIPA and ECPA, the precise contours of "in transit" (and therefore, unlawful) acquisitions  
4 of an email's content are far from settled. *Compare e.g., Backhaut v. Apple Inc.*, 148 F. Supp. 3d  
5 844, 849-50 (N.D. Cal. 2015) (granting defendant's motion for summary judgment as to  
6 Plaintiffs' ECPA claims as, *inter alia*, "[t]here can be no interception for purposes of the Wiretap  
7 Act if the acquisition of the message occurs while the message is in storage, even if it is in  
8 temporary storage incidental to the transmission of the communication.") (citing *Konop v.*  
9 *Hawaiian Airlines, Inc.*, 302 F.3d 868, n.6 (9th Cir. 2002)) *with In re Carrier IQ, Inc., Consumer*  
10 *Privacy Litig.*, 78 F. Supp. 3d 1051, 1081-82 (N.D. Cal. 2015) (distinguishing *Konop* and holding  
11 that ("even if . . . the communications at issue in this case were in transitory storage on Plaintiffs'  
12 mobile devices (such as the devices' random access memory, cache memory, etc.) when the [the  
13 purported interception occurred], it is not at all apparent why there was no "captur[ing] or  
14 redirect[ing]" of these communications contemporaneous with their transmission.") (quoting *Noel*  
15 *v. Hall*, 568 F.3d 743, 749 (9th Cir. 2009)).

16 While Plaintiffs firmly believe in the strength of their claims, and have amassed  
17 substantial evidence in support of those claims through the discovery process, there is at least  
18 some risk that, absent a settlement, Google might prevail in motion practice, at trial, or on appeal,  
19 resulting in no relief for Class Members. This weighs in favor of preliminary approval. *See, e.g.,*  
20 *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (noting that the  
21 elimination of "[r]isk, expense, complexity, and likely duration of further litigation," including,  
22 *inter alia*, an "anticipated motion for summary judgment, and . . . [i]nevitable appeals would  
23 likely prolong the litigation, and any recovery by class members, for years," which facts militated  
24 in favor of approval of settlement.); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) ("[I]n any  
25 case there is a range of reasonableness with respect to a settlement – a range which recognizes the  
26 uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily  
27 inherent in taking any litigation to completion.").

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1           Ultimately, Google has agreed to provide the injunctive relief sought by Plaintiffs on  
2       behalf of the Settlement Classes. Namely, Google has agreed to make substantial architectural  
3       changes to eliminate pre-delivery scanning for Advertising Purposes. Further, the release  
4       obtained by the Google Releasees only extends to Settlement Class Members' claims for  
5       declaratory, injunctive, and non-monetary equitable relief. No Settlement Class Member, with the  
6       exception of the Named Representatives, will release any claim for damages under CIPA, ECPA  
7       or any other cause of action. This Court has held, under analogous circumstances, that such a  
8       result obtained on behalf of a class of email users and certified under Rule 23(b)(2) is within the  
9       range of possible approval. *In re Yahoo Mail Litig.*, No. 13-cv-04980-LHK (ECF No. 182) (N.D.  
10      Cal. Mar. 15, 2016).

11           In sum, the Settlement provides substantial relief to all Settlement Class Members based  
12      on the strengths of their respective claims without delay and is within the range of possible  
13      approval, particularly in light of the above risks that Settlement Class Members would face in  
14      litigation.

15                           **2.       The Settlement is the Product of Arm's-Length Negotiations After a**  
16                           **Thorough Investigation, Without a Trace of Collusion**

17           “Before approving a class action settlement, the district court must reach a reasoned  
18      judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion  
19      among, the negotiating parties.” *City of Seattle*, 955 F.2d at 1290. Where a settlement is the  
20      product of arm's-length negotiations conducted by capable and experienced counsel, the court  
21      begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 Newberg  
22      § 11.41; *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at \*32  
23      (C.D. Cal. June 10, 2005); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980).

24           Here, the Settlement was reached after informed, extensive arm's-length negotiations.  
25      First, the Settlement was reached after a thorough investigation into and discovery of the legal  
26      and factual issues in the Action. In particular, before filing suit, Class Counsel conducted an  
27      extensive investigation into the factual underpinnings of the practices challenged in the Action, as  
28      well as the applicable law. In addition to their pre-filing efforts, Class Counsel engaged in an

1 ongoing factual and legal investigation throughout the pendency of this Action. As part of their  
2 continued investigation, Class Counsel reviewed and analyzed hundreds of thousands of pages of  
3 documents produced by Google in discovery relating to the key issues in this Action, including,  
4 among other things, Google's messaging architecture and profiling capabilities, as well as all of  
5 the relevant deposition testimony of Google employees from the *In re Gmail* MDL, and a  
6 corporate designee who testified in this action regarding Google's current practices. Joint Decl.,  
7 ¶ 30.

8 Second, the Settlement was only reached after the parties participated in two separate  
9 mediation sessions before experienced mediator Randall Wulff, which processes included the  
10 exchange of detailed, confidential mediation statements and vigorous advocacy on the part of  
11 both parties, throughout. Joint Decl., ¶ 14. The Settlement also benefits from direct guidance by  
12 the Court at the March 9, 2017 hearing on preliminary approval and in the Order. ECF No. 71.  
13 Finally, the Settlement represents the culmination of continued, adversarial discovery and case  
14 prosecution.

15 In sum, the Settlement was reached only after Class Counsel conducted an extensive  
16 factual investigation and discovery into the Google's alleged misconduct, including continued  
17 investigation to confirm current practices in 2017, and thoroughly researched the law pertinent to  
18 Plaintiffs' and Class Members' claims and Google's defenses. Consequently, Class Counsel had a  
19 wealth of information at their disposal before finalizing settlement negotiations, which allowed  
20 Class Counsel to adequately assess the strengths and weaknesses of Plaintiffs' case and to balance  
21 the benefits of settlement against the risks of further litigation. Nothing in the course of the  
22 negotiations or in the substance of the proposed Settlement presents any reason to doubt the  
23 Settlement's fairness.

### 24 **3. The Recommendation of Experienced Counsel Favors Approval**

25 In considering a proposed class settlement, "[t]he recommendations of plaintiffs' counsel  
26 should be given a presumption of reasonableness." *Knight v. Red Door Salons, Inc.*, No. 08-  
27 01520 SC, 2009 U.S. Dist. LEXIS 11149, at \*11 (N.D. Cal. Feb. 2, 2009); *see also Linney v.*  
28 *Cellular Alaska Partnership*, No. C-96-3008 DLJ, 1997 WL 450064, at 5 (N.D. Cal. July 18,



1 1997). As demonstrated herein and in each respective firm’s resume, Class Counsel have  
2 extensive experience litigating and settling consumer class actions and other complex matters  
3 (Joint Decl., ¶¶ 22-29) and have conducted an extensive investigation into the factual and legal  
4 issues raised in this Action (Joint Decl., ¶¶ 11-13, 30). Using their experience and knowledge,  
5 Class Counsel have weighed the benefits of the Settlement against the inherent risks and expense  
6 of continued litigation, and they believe that the proposed Settlement is fair, reasonable, and  
7 adequate. Joint Decl., ¶ 31. The fact that qualified and well-informed counsel endorse the  
8 Settlement as being fair, reasonable, and adequate weighs in favor of approving the Settlement.

9 **D. The Proposed Form of Notice and Notice Plan are Appropriate and Should be**  
10 **Approved**

11 The Settlement seeks only declaratory, injunctive, and non-monetary equitable relief, and  
12 Plaintiffs seek certification of Settlement Classes pursuant to Fed. R. Civ. P. 23(b)(2).  
13 Accordingly, notice is discretionary, not mandatory. Fed. R. Civ. P. 23(c)(2) (“For any class  
14 certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class.”)  
15 (emphasis added)); *Wal-Mart*, 131 S. Ct. at 2558 (“The Rule provides no opportunity for . . . (b)(2)  
16 class members to opt out, and does not even oblige the District Court to afford them notice of the  
17 action.”); *In re Yahoo Mail Litig.*, No. 13-cv-04980-LHK, 2016 WL 4474612, at \*5 (N.D. Cal.  
18 Aug. 25, 2016) (“[B]ecause Rule 23(b)(2) provides only injunctive and declaratory relief, ‘notice  
19 to the class is not required.’”) (quoting in part *Lyon v. United States Immigration and Customs*  
20 *Enf’t*, 300 F.R.D. 628, 643 (N.D. Cal. 2014)).

21 Nevertheless, the parties have agreed to provide notice to members of the Settlement  
22 Classes in accordance with the Notice Plan attached as Exhibit C to the Settlement Agreement.  
23 Under those terms, notice shall be published via the Settlement Administrator, KCC, who will  
24 place banner ads on a collection of popular websites. KCC will ensure these ads make  
25 100,000,000 unique impressions (*i.e.*, views of the ad) upon Internet users, with no single user  
26 receiving more than three impressions. The banner ads will direct Internet users, via a link, to the  
27 Settlement Website, which will provide fulsome notice to Class Members. The notice on the  
28 Settlement Website clearly and concisely apprises the reader of the terms of the Settlement and

1 the date and manner by which any Class Member may object.<sup>7</sup> Specifically, the notice succinctly  
2 describes the settlement in plain language as follows:

### 3 **Summary of the Proposed Settlement**

4 In the Settlement, Google has agreed to cease all automated  
5 scanning of emails sent to Gmail accounts for advertising purposes  
6 while the emails are in transmission prior to delivery to the Gmail  
7 user's inbox. This includes elimination of any scanning to create  
8 user profiles for advertising purposes. The Settlement defines  
9 advertising purposes as "for the purpose of serving advertisements,  
10 including advertisements served in Gmail and in other  
11 Google products and services. 'Advertising Purposes' includes the  
12 creation of user models for the purpose of serving advertising."  
13 Although Google does not currently conduct any scanning for  
14 advertising purposes related to outbound emails sent by Gmail  
15 users, Google has agreed to refrain from initiating any scanning for  
16 advertising purpose of outbound emails. These prohibitions will  
17 remain in place for three years.

18 Google also is making a business-related change to the Gmail  
19 service, as part of which, Google will no longer scan the contents of  
20 emails sent to Gmail accounts for advertising purposes, whether  
21 during the transmission process or after the emails have been  
22 delivered to the Gmail user's inbox. These changes are not subject  
23 to the three-year time period or other terms of the Settlement.  
24 Google views these additional changes as independent of the  
25 Settlement, but as consistent with and evidencing Google's  
26 commitment to the Settlement.

27 Joint Decl. Ex. 1-A (Notice).

28 The cost of providing this notice is estimated to be \$123,500. A copy of the proposed  
notice is attached as Exhibit B to the Settlement Agreement, and is sufficient to inform Class  
Members of the proposed Settlement and their right to object to it.<sup>8</sup>

In short, the form and manner of notice proposed here fulfill all of the requirements of  
Rule 23 and due process, and is "reasonably calculated, under all circumstances, to apprise  
interested parties of the pendency of the action and afford them an opportunity to present their  
objections." *Hendricks*, 2015 U.S. Dist. LEXIS 96390, at \*24 (quoting *Phillips Petroleum Co. v.*

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<sup>7</sup> The parties propose to give Class Members 90 days from the date that the Notice is initially disseminated to object to the Settlement.

<sup>8</sup> Google will also provide notice to appropriate federal and California government officials in compliance with the Class Action Fairness Act, 28 U.S.C. § 1715. *See* Settlement Agreement at ¶ 55.

1 *Shutts*, 472 U.S. 797, 812 (1985)). Plaintiffs request that the Court direct that notice of the  
2 proposed Settlement be given to the Settlement Class.

3 **CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court do the following:

- 5 a) Grant preliminary approval of the proposed Settlement Agreement entered into  
6 between the parties;
- 7 b) Certify the Settlement Classes as defined in the Settlement;
- 8 c) Appoint Plaintiffs Daniel Matera and Susan Rashkis as Class Representatives of  
9 the proposed Classes;
- 10 d) Appoint Michael W. Sobol of Lieff Cabraser Heimann & Bernstein LLP, Hank  
11 Bates of Carney Bates & Pulliam PLLC, and Ray Gallo of Gallo LLP as Class  
12 Counsel for the proposed Classes;
- 13 e) Approve the parties' proposed notice program, including the proposed form of  
14 notice attached as Exhibit B to the Settlement Agreement, and directing that notice  
15 be disseminated pursuant to such program;
- 16 f) Appoint KCC as Settlement Administrator, and direct KCC to carry out the duties  
17 and responsibilities of the Settlement Administrator specified in the Settlement;
- 18 g) Stay all non-Settlement related proceedings in the above-captioned case pending  
19 final approval of the Settlement; and
- 20 h) Set a Fairness Hearing and certain other dates in connection with the final approval  
21 of the Settlement.

22 Dated: July 21, 2017

Respectfully submitted,

23 By: /s/ Michael W. Sobol

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